

**Aznor bin Abdul Karim & Anor v
Kemasrunding Sdn Bhd**

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO
D2-28-19 OF 1997

ABDUL AZIZ J

28 OCTOBER 1997

Companies and Corporations — Winding up — Petition — Amendment of — Delay by petitioner in applying for amendment to petition — Whether respondent justified in opposing delay in application — Whether delay had prejudiced the respondent

Companies and Corporations — Winding up — Petition under s 218 — Alternative reliefs under s 181 of the Companies Act 1965 added to petition — Whether petition could be amended to remove non-s 218 averments — Whether amendment would prejudice respondent company — Companies Act 1965 ss 181 & 218

The petitioners filed a petition to wind up the respondent company. The petition's heading held out that it was a petition for winding up under s 218 of the Companies Act 1965 ('the Act'). It said that the grounds for winding up the company were under the just and equitable principle under s 218(1)(i) of the Act, namely, 'that it is just and equitable that the company be wound up'. The petition, however, went on to set out facts intended to lay the foundation for seeking two other reliefs, as an alternative to a winding up, which are not available in a winding-up petition under s 218 but which may be available in an oppression petition under s 181. The respondent's solicitors took the view that it was a s 218 petition and that the petition be amended by removing from it non-s 218 averments and reliefs, the reason being that in a winding-up petition under s 218, the court has no jurisdiction to grant any relief that is available under s 181. The respondent also complained of delay on the part of the petitioners in applying for the amendment of the petition.

Held, ordering that the petition be amended as prayed:

- (1) The petition in the present case was a winding-up petition under s 218 of the Act to which were added prayers and averments to support prayers for alternative reliefs that are available only under s 181. It was not a hybrid petition or a rolled-up petition. Since it was a s 218 petition, it was possible to justly remove from it the elements proper to s 181 that had been tagged on to it. The nature of the defect in the present petition was such that it was capable of amendment to cure the defect (see pp 575E and 576F-G); *Lai Kim Loi v Dato' Lai Fook Kim & Anor* [1989] 2 MLJ 290 distinguished.
- (2) As regards the delay in applying for amendment, the only reason why the respondent would need the amendment to be done timeously was that the respondent — in their affidavit in reply — would not have to respond to the matters in the petition that would have been deleted, but if the amendment were delayed,

- A the respondent — so as not to be guilty of delay in filing their affidavit — would have to file an affidavit which would include responses to all the averments in the petition as originally filed. However, such a reason would not justify opposing the application if it were not made timeously. If because of this delay the
- B respondent had been put to unnecessary expense in the preparation of responses to those parts of the petition that were to be deleted, then the fitting sanction for the delay should be one in the nature of costs.

- C The important question about the delay in applying for amendment was whether and in what manner it had prejudiced the respondent. The fact that the petitioners had proceeded to advertise the petition before the question of amendment could be resolved had not prejudiced the respondent. The petition would have been advertised all the same as a winding-up petition in the event of an early application (see pp 576H-I, 577A-C, H-I and 578A).
- D

[Bahasa Malaysia summary]

- E Pempetisyen-pempetisyen memfailkan satu petisyen untuk menggulung syarikat penentang. Tajuk petisyen menyatakan bahawa ia adalah satu petisyen untuk menggulung di bawah s 218 Akta Syarikat 1965 ('Akta tersebut'). Ia mengatakan bahawa alasan untuk menggulung syarikat tersebut adalah di bawah prinsip adil dan saksama di bawah s 218(1)(i) Akta tersebut, iaitu, 'bahawa adalah adil dan saksama bahawa syarikat tersebut digulung'. Namun demikian, petisyen tersebut terus menyatakan fakta yang bertujuan memaparkan
- F asas untuk meminta dua relief lain, sebagai suatu alternatif kepada penggulangan, yang tidak boleh didapati dalam petisyen penggulangan di bawah s 218 tetapi yang boleh didapati dalam petisyen penindasan di bawah s 181. Peguamcara penentang berpandangan bahawa ia adalah satu petisyen s 218 dan bahawa petisyen dipinda dengan memadamkan penegasan dan relief yang tidak dirangkumi oleh s 218,
- G dengan sebab bahawa dalam suatu petisyen penggulangan di bawah s 218, mahkamah tidak mempunyai bidang kuasa untuk membenarkan sebarang relief yang boleh didapati di bawah s 181. Penentang juga mengadu tentang kelewatan pada pihak pempetisyen-pempetisyen dalam memohon pindaan petisyen.

- H **Diputuskan**, memerintah bahawa petisyen dipinda seperti yang dipohon:

- I (1) Petisyen dalam kes ini adalah petisyen penggulangan di bawah s 218 Akta tersebut yang mana telah ditambah permohonan dan penegasan bagi menyokong permohonan untuk relief alternatif yang boleh didapati hanya di bawah s 181. Ia bukanlah suatu petisyen kacukan atau petisyen 'rolled-up'. Oleh kerana ia adalah suatu petisyen s 218, bolehlah secara adil memadamkan daripadanya unsur-unsur yang sewajarnya di bawah s 181 yang

telah diletakkan di atasnya. Sifat kecacatan dalam petisyen ini adalah demikian hinggalah ia mampu dipinda bagi mengubati kecacatan (lihat ms 575E dan 576F-G); *Lai Kim Loi v Dato' Lai Fook Kim & Anor* [1989] 2 MLJ 290 dibeza.

- (2) Mengenai kelewatan dalam memohon untuk pindaan, satu-satunya sebab mengapa penentang akan memerlukan pindaan dijalankan secara menepati masa adalah bahawa penentang — dalam affidavit jawapan mereka — tidak perlu membalas kepada hal-hal dalam petisyen yang sepatutnya dipadamkan, tetapi andainya pindaan ditangguhkan, penentang — supaya tidak didapati bersalah atas kelewatan dalam memfailkan affidavit mereka — haruslah memfailkan affidavit yang akan termasuk jawapan kepada kesemua penegasan dalam petisyen seperti yang difailkan pada asalnya. Namun demikian, sebab seperti ini tidak akan memberi justifikasi membantah permohonan sekiranya ia tidak dibuat menepati masa. Jika disebabkan kelewatan ini penentang telah menanggung belanja yang tidak perlu demi menyediakan jawapan kepada bahagian petisyen yang hendak dipadamkan, maka hukuman yang sesuai untuk kelewatan haruslah dalam bentuk kos.

Persoalan penting mengenai kelewatan dalam memohon pindaan adalah sama ada dan bagaimanakah ia telah memudaratkan penentang. Hakikat bahawa pempetisyen-pempetisyen telah terus mengiklankan petisyen sebelum persoalan pindaan boleh diselesaikan tidak memudaratkan penentang. Petisyen tetap akan diiklankan sebagai petisyen penggulungan andainya permohonan awal dibuat (lihat ms 576H-I, 577A-C, H-I dan 578A).]

Notes

For cases on winding up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 618-918.

For cases on petition under s 218, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 846-848.

Case referred to

Lai Kim Loi v Dato' Lai Fook Kim & Anor [1989] 2 MLJ 290 (distd)

Legislation referred to

Companies Act 1965 ss 181, 218, 221(3), 223

CP Mahendran (RR Chelliah Brothers) for the petitioners.

Alex de Silva (Skrine & Co) for the respondent.

Cur Adv Vult

Abdul Aziz J: The petition to wind up the respondent company was presented on 15 January 1997. Its heading holds out that it is a petition for

- A winding up under s 218 of the Companies Act 1965 ('the Act'). After setting out some information about the company, it says that the grounds for winding up the company are under the just and equitable principle, which I take to mean the grounds in para (i) of sub-s (1) of s 218, namely, 'that it is just and equitable that the company be wound up'. The petition gives three reasons for so contending. The first reason is that the company
- B has deviated from its principal objective. The facts to support that reason are given in para 6. The second reason is that the principal objective of the company is no longer capable of being attained. The facts in support are given in paras 7 and 8. The third reason is oppression and unfair treatment of minority shareholders. The facts in support are given in paras 9 to 12.
- C There immediately follows a conclusion to the effect that in those circumstances it is just and equitable that the company be wound up. Whether or not the three reasons are good in law to render it just and equitable that the company be wound up, it is clear that thus far, in form and intention, the petition is a petition for winding up under s 218. The principal prayer under para 19 is for a winding up.

- D The petition, however, goes on, in paras 13 to 18, to set out facts intended to lay the foundation for seeking two other reliefs, as an alternative to a winding up, which are not available in a winding-up petition under s 218 but which may be available in an oppression petition under s 181.

- E The petition is, therefore, a winding-up petition under s 218 to which are added prayers and averments to support prayers for alternative reliefs that are available only under s 181. That was also how the company's solicitors viewed the petition, as is evident from their letter to the petitioners' solicitors dated 14 February 1997.

- F In that letter, the company's solicitors were not complaining, for example, that the petition was confusing as to whether it was s 218 or a s 181 petition, or that it was actually a s 181 petition but cloaked as s 218 petition in order to put pressure on the company, by means of the harm likely to be caused to them through the process of advertising and the operation of s 223 — which apply in the case of a winding-up petition — to agree to come to terms on reliefs under s 181. The company's solicitors rightly took
- G the view that it was a s 218 petition and they merely requested, quite reasonably, that the petition be amended by removing from it non-s 218 averments and reliefs. It implied that they would have been happy, procedurally, to face the petition as a winding-up petition with all the consequences that it might bring from advertising and from s 223. The
- H reason they gave in their letter for asking that the non-s 218 matters be removed from the petition was that it is settled law that in a winding-up petition under s 218, the court has no jurisdiction to grant any relief that is available under s 181. They did not say what they had in mind as 'settled law', but to give such a reason they did not need to have in mind the facts and decision in *Lai Kim Loi v Dato' Lai Fook Kim & Anor* [1989] 2 MLJ 290. They could as well have had in mind the various provisions of Division 1 of Pt X of the Act — from which it is obvious that, except as provided in sub-s (3) of s 221, the only order that can be made on a successful petition under s 218 is an order for winding up — or some judicial authority which confirms that that is the law.
- I

The petition in *Lai Kim Loi* was quite different in feature from the petition in this case. From the report of the Supreme Court judgment, it would appear that it was intituled a winding-up petition. From what the Supreme Court said at p 219B–C (left), it would appear that all acts alleged in the petition were acts intended to show oppressive conduct under s 181. The first three prayers were prayers for reliefs that could have been given only under s 181. The prayer for a winding up came as the fourth and last alternative, and moreover it was a prayer for winding up under either ss 181 or 218. From the order added by the Supreme Court at the end of the judgment, it is obvious that the Supreme Court regarded the petition as one that should have been under s 181. It was therefore a s 181 petition in the guise of a s 218 petition. It would appear from p 293G–H (left) that learned counsel for the subject company had argued that the petitioners had chosen to present the petition as a s 218 petition because they wanted to advertise the petition to embarrass his clients. The learned judge at first instance used the word ‘rolled up’ to describe the state of affairs. See p 291F (right). The Supreme Court, at p 295E (right), labelled the petition as an imprecise and a hybrid petition, after indicating their view that the defect could not be cured by amendment because the defect did not lie in a mere non-compliance with rules of court.

I can readily appreciate that, being rolled-up or hybrid, it would not have been possible to justly amend the petition so as to make it clear whether it was a s 181 petition or a s 218 petition. As obviously it was a s 181 petition, a neat amendment would have been to change the title to one under s 181, but then the petition had already wrongly taken the procedural route for a s 218 petition, and along it advertising had been done.

In the present case, as I have tried to show, the petition is not a hybrid petition or a rolled-up petition as the petition in *Lai Kim Loi* was. It is a s 218 petition and it is possible to justly remove from it the elements proper to s 181 that have been tagged on to it.

The principal argument advanced by the company in opposing the amendment is that the court ought not to exercise its discretion by allowing the amendment in view of the reasons given by the Supreme Court for saying that the defect in the petition in *Lai Kim Loi* could not be cured by amendment. As, however, the nature of the defect in the present petition is different from the defect in *Lai Kim Loi*, I do not consider that those reasons ought to be applied to the petition in this case so as to make it incapable of amendment to cure the defect.

As regards delay in applying for amendment, it strikes me as contradictory that while recognizing that the petition should be amended, and was capable being amended by deleting all non-s 218 matters from it, and while fashioning their letter of 14 February 1997 as a request that it be done, the solicitors for the company in that letter should insist that the amendment application be made timeously, or else they would object to the amendment. Having agreed in principle to the amendment, the only reason that I can see why the company would need the amendment to be done timeously is that in that case, the company would not in their

A affidavit in reply have to respond to the matters in the petition that would have been deleted, but if the amendment were delayed, the company, so as not to be guilty of delay in filing their affidavit, would have to file an affidavit which would include responses to all the averments in the petition as originally filed. But such a reason would not justify opposing the application if it were not made timeously. If because of the delay on the part of the petitioners in applying for amendment, the company had been put to unnecessary expenses in the preparation of responses to those parts of the petition that were to be deleted, then the fitting sanction for the delay should be one in the nature of costs.

C That is why I do not consider that the objection to this application on the grounds of delay should be treated so seriously as to require me to determine whether the petitioners have given a satisfactory explanation for the delay. From the letter dated 17 February 1997 which the solicitors for the petitioners wrote in reply to the letter of the solicitors for the company dated 14 February 1997, it would appear as if the solicitor for the petitioners genuinely understood that the negotiations that had commenced between the parties would excuse the petitioners from making the application to amend while the negotiations were pending. On the other hand, the letter that the solicitors for the petitioners wrote to the solicitors for the company on 13 August 1997, wherein they said, rightly in my judgment, that the case of *Lai Kim Loi* could be distinguished, would seem to indicate that up till then they believed that an amendment was not necessary. It is therefore probable that the reason for the delay was a mixture of belief that the petitioners did not need to apply for amendment while the negotiations were pending and belief that they did not really have to apply for amendment at all. They did change their minds five days later, and applied for amendment, I think because, on being better informed, their solicitors felt that the safest course for them would be to amend the petition after all. I would dismiss the suggestion made in submission that the change of mind was indicative of an attempt to put pressure on the company by means of the petition. That is a question that goes to the petition itself and that will have to be considered at the hearing of the petition itself. Right now I do not consider that there is anything in the conduct of the petitioners or their solicitors in the matter of amendment of the petition that lends support to the suggestion that the petition is intended to put pressure on the company to resolve the internal dispute in the company in the way the petitioners want it resolved.

H The really important question about the delay in applying for amendment is whether and in what manner it has prejudiced the company. In reply to that question, which I put to him in the course of submission, learned counsel for the company said that the prejudice lay in the fact that the petitioners had proceeded to advertise the petition before the question of amendment could be resolved. I am still unable to see in the fact of advertisement the prejudice to the company arising from the delay in applying for amendment. It is not as if, had the petitioners acted early to have the petition amended, the petition would not have been advertised. It would have been advertised all the same as a winding-up petition in view

of the fact that, in that event of an early application, the company would not have objected to the amendment and the amendment would have been made which would have confirmed the status of the petition as a winding-up petition. A

I therefore order that the petition be amended as prayed, except that, as the solicitors for the petitioners have indicated, para 9 is not to be deleted. In the circumstances it is fair, I think, that I order that costs be in the cause. B

Order that the petition be amended as prayed.

Reported by David Lai C

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